Supreme Court, U.S.
FILED
SEP 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PETITIONERS

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL,
MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

LEONARD SCHAITMAN
NICHOLAS S. ZEPPOS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

16 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' challenge to an advisory opinion issued by the Special Counsel of the Merit Systems Protection Board was not ripe for judicial review.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 ..... 9, 10

Babbitt v. *United Farm Workers Nat'l Union*, 442 U.S. 289 8

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 10

Bush v. *Lucas*, 462 U.S. 367 8

Ellis v. *Dyson*, 421 U.S. 426 6

Ewing v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 9

FTC v. *Standard Oil Co.*, 449 U.S. 232 9

Heckler v. *Chaney*, No. 83-1878 (Mar. 20, 1985) 9

Public Affairs Assoc., Inc. v. *Rickover*, 369 U.S. 111 5

Southeastern Promotions, Ltd v. *Conrad*, 420 U.S. 546 10

Special Counsel v. *Biggs*, 1983 Fed. Merit Sys. Rep. 5238 (Aug. 23, 1983) 9

Page

Cases--Continued:

Steffel v. *Thompson*, 415 U.S. 452 6

United Public Workers v. *Mitchell*, 330 U.S. 75 ..... 7, 8

United States Civil Service Comm'n v. *National Ass'n of Letter Carriers*, 413 U.S. 548 9-10

Whitney Nat'l Bank v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 9

Younger v. *Harris*, 401 U.S. 37 7

Statutes:

Hatch Act, 5 U.S.C. 7321 *et seq.* 2

5 U.S.C. 1206(e)(1)(A) 9

5 U.S.C. 1206(g)(1) 9

5 U.S.C. 1206(*l*) 9

5 U.S.C. 1207(a) 9

5 U.S.C. 1207(b) 9

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1925

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PETITIONERS

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL,
MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 747 F.2d 748. The memorandum decision of the district court (Pet. App. 33a-57a) is reported at 589 F. Supp. 1551.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a-32a) was entered on November 2, 1984. A petition for rehearing was denied on February 8, 1985 (Pet. App. 29a). On April 29, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 10, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners are two labor organizations representing federal employees, one of the union's locals, and the local's president. In March 1984, they filed consolidated

actions in the United States District Court for the District of Columbia, seeking to enjoin the Special Counsel of the Merit Systems Protection Board (MSPB) from " 'enforcing' " (Pet. App. 5a) a letter addressing the propriety under the Hatch Act (5 U.S.C. 7321 *et seq.*) of certain voter registration activity and from " 'prosecuting [union members] from [sic] engaging in nonpartisan voter registration * * * activities' " (Pet. App. 35a). The letter was written by a member of the Special Counsel's staff to another union, which is not a party to this suit. The district court denied petitioners' motion for a temporary restraining order because the letter was not addressed to their activities. The court instructed petitioners to seek an opinion from the Special Counsel with respect to the voter registration activities that they were planning to undertake. *Id.* at 4a-5a, 34a-36a.

Petitioners requested an advisory opinion from the Special Counsel on April 2, 1984. Their joint request stated only that the unions " 'have each endorsed a candidate for the presidency in 1984' " and that they " 'are now engaged, through [their] locals and chapters, in nonpartisan voter registration activity,' " during which " 'no attempt is made to solicit registrants on the basis of political party or candidate preference' " (Pet. App. 6a). The letter contained no factual details of any of the unions' particular registration activities. It requested a response within one week. *Ibid.*

The Special Counsel responded four days later, on April 6, 1984 (Pet. App. 59a-67a). His letter noted at the outset that it was "advisory in nature" and that he had "not conducted any investigation into [petitioners'] activity" (*id.* at 60a). The letter also noted "the paucity of information" given in petitioners' request (*id.* at 59a). After discussing the Hatch Act in general terms, the Special Counsel stated, "[t]he determination of whether a voter registration drive is

a political campaign activity must be made from the available evidence" (*id.* at 63a). In the Special Counsel's view, the absence of partisan solicitation at voter registration sites was "only one factor to be considered" (*ibid.*). As "only a partial list" of "[s]ome other relevant factors" that he might take into account, the Special Counsel noted (*id.* at 64a):

> other political activities of the sponsoring organization, the degree to which that organization has become identified with the success or failure of a partisan political candidate, issue or party, the nexus, if any, between the decision to undertake a voter registration drive and the other political objectives of the sponsor, whether particular groups are targeted for registration on the basis of their perceived political preference and the nature of publicity circulated to targets of the drive immediately prior to or during the drive.

Based on these principles, the Special Counsel concluded that the available information "indicate[d] that [petitioners'] voter registration drives have become adjuncts to [their] political campaign activities" (Pet. App. 65a). From this premise, "the ineluctable conclusion must be that those voter registration drives * * * are, in fact, partisan" and therefore prohibited by the Hatch Act (*id.* at 66a). Finally, the Special Counsel noted that federal employees "remain free to participate in truly nonpartisan registration drives" (*id.* at 67a).

b. After receiving this advisory opinion, petitioners amended their complaints to ask that the Special Counsel be enjoined from prosecuting them on the basis of the interpretation of the law set forth in his April 6 letter and that the letter be declared contrary to the First Amendment. On cross-motions for summary judgment, the district court held that petitioners' claims were ripe for adjudication but it ruled in favor of the Special Counsel on the merits (Pet. App. 33a-57a). The case was not premature, the district court concluded, because in its view the advisory letter was

"tantamount to a threat of enforcement" (*id.* at 48a). On the merits, the district court found that "the Special Counsel's analysis [was] entirely appropriate" and that "[petitioners'] position—that their drives are necessarily non-partisan simply because prospective voters are registered without being importuned—* * * ignore[s] the realities of modern political campaigning" (*id.* at 52a).

2. The court of appeals vacated the district court's judgment (Pet. App. 1a-28a) on the ground that petitioners' complaints "fail[] to present concrete claims ripe for court adjudication" (*id.* at 4a). The court of appeals concluded that the case was not ripe for two independent reasons. First, "the advice the Special Counsel is permitted to give creates no law and binds neither the public nor any agency or officer of government" (*id.* at 10a). It is the MSPB, not the Special Counsel, that adjudicates Hatch Act cases, and only the Board can "speak definitively" as to the agency's interpretation of the statute (*id.* at 12a). Not only would judicial review of "nonbinding advisory expositions" of the law be unprecedented (*id.* at 10a; footnote omitted), it would "jeopardize" the Special Counsel's ability to delimit "safe harbors" for federal employees' activity (*id.* at 14a) and would "strip the MSPB" of its authority to adjudicate Hatch Act cases in the first instance (*id.* at 15a).

Even assuming that the Special Counsel could definitively interpret the Hatch Act, the court of appeals concluded that petitioners' case was nonetheless premature because the letter at issue did not represent a realistic threat of enforcement of the Hatch Act against petitioners' members (Pet. App. 16a-19a). Noting the short time that had been available to the Special Counsel to prepare his advisory letter (*id.* at 17a) and the "fact-thin quality of the case" that petitioners presented to him, the court of appeals observed that "[t]he Special Counsel ha[d] confronted no * * * member [of petitioners] with a prosecution threat

should he or she participate in a particular voter registration drive" (*id.* at 18a). Thus, no " 'genuine threat of enforcement' ha[d] been demonstrated here" (*ibid.*).[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' claims are factbound, limited as they are to the interpretation to be placed on a single letter written by the Special Counsel in response to the inquiry put to him by petitioners in this case. As the court of appeals noted, petitioners are free "to formulate further, more detailed requests for advice" with respect to particular voter registration activities that they wish to conduct in the future, as to which the Special Counsel "may well reach other conclusions" (Pet. App. 19a). His advice with respect to an election now past, though perhaps not moot,[2] is of little continuing significance. For these reasons, further review is unwarranted.

---

[1]Judge Edwards joined the opinion of the court and concurred to make clear his view that the MSPB's administrative adjudicatory authority would not prevent "normal [judicial] adjudication of otherwise properly presented constitutional or statutory claims" (Pet. App. 21a). Judge Mikva dissented on the ground that the Special Counsel's letter did present a realistic threat of prosecution (*id.* at 22a-28a). No judge reached the merits of petitioners' claims.

[2]Petitioners' claims may fit within the exception to the mootness doctrine for controversies that are capable of repetition while evading review, as they argue (Pet. 16-17 n.9). But the resolution of claims resting on particular facts arising during future election campaigns should be made in the context of those circumstances and not on the basis of the stale and "sketchily summarized" (*Public Affairs Assoc., Inc.* v. *Rickover*, 369 U.S. 111, 113 (1962)) facts of the instant case. Regardless of whether the April 6, 1984 letter threatened petitioners with prosecution during the 1984 election campaigns, it cannot reasonably be read as such a threat with respect to future campaigns and voter registration drives, as to which no facts whatsoever were before the Special Counsel.

1. Petitioners' primary argument (Pet. 7-15) is that the Special Counsel's advisory opinion represented a genuine threat of enforcement of the Hatch Act against them and their members. The court of appeals correctly resolved this factual question against them.

Petitioners rely (Pet. 7) on cases such as *Steffel* v. *Thompson*, 415 U.S. 452 (1974), for the proposition that they need not await an actual prosecution to obtain judicial review if they are confronted with a serious threat that they will in fact be prosecuted if they engage in their proposed activities. Accepting this premise and citing *Steffel*, the court of appeals concluded (Pet. App. 18a) that the Special Counsel's letter did not represent such a threat. This conclusion is undoubtedly correct. The letter did not by its terms indicate any intention on the part of the Special Counsel to prosecute petitioners. Nor was the mere issuance of the opinion tantamount to a decision that the Special Counsel would bring a prosecution. As the court of appeals noted (Pet. App. 19a), the Special Counsel has through 1983 never prosecuted more than 13 Hatch Act cases in a single year; in that year, he initiated only two prosecutions despite issuing 4,000 advisory opinions and receiving 86 allegations of violations. Cf. *Ellis* v. *Dyson*, 421 U.S. 426, 434 (1975) (state's enforcement pattern relevant to existence of credible threat of prosecution).[3] The advisory letter in this case was thus hardly sufficient to raise a realistic likelihood of

---

[3]Even though petitioners advised the Special Counsel that they had engaged and continued to engage in the general sorts of voter registration drives that the Special Counsel addressed in his letter (Pet. App. 6a), they have not alleged that the Special Counsel has prosecuted their members for those activities; they offer no reason to expect that the Special Counsel would treat their future activities any differently in the exercise of his prosecutorial discretion.

prosecution. See generally *Younger* v. *Harris*, 401 U.S. 37, 42 (1971) ("imaginary or speculative" fears of prosecution insufficient).[4]

The "sweeping generalit[ies]" (Pet. App. 10a) petitioners presented to the Special Counsel and the circumstances surrounding his issuance of the letter support this conclusion. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90 (1947) (Hatch Act claims not ripe for review where the Court could "only speculate as to the kinds of political activity the appellants desire[d] to engage in"). Petitioners averred only that they had endorsed presidential candidates and that no partisan solicitation would take place at their registration sites. The Special Counsel, however, stated that a number of other factors would be relevant to his decision in any particular case (Pet. App. 64a). For example, the Special Counsel identified "the nature of publicity circulated to targets of the drive *immediately prior to or during the drive*" as one such factor (*ibid.*; emphasis added). Since the Special Counsel could not be aware of the nature of such publicity in advance of any particular registration drive, it would be unreasonable to conclude that his letter applied across the board to all such drives.[5] Indeed, the letter itself makes clear that "truly nonpartisan registration drives" are permissible (*id.* at 67a). Similarly, the district court noted (*id.* at 55a) that the degree of autonomy of any particular

---

[4]The letter's observation that a violation would be shown on certain facts does not change this conclusion. The letter, which was written in only four days "at the behest of parties who held the Special Counsel's feet to the fire of litigation while providing him with few facts," cannot reasonably be regarded "as a product of the agency's considered judgment" or as a firm decision that petitioners would indeed be prosecuted (Pet. App. 16a n.23).

[5]Thus, while the Special Counsel was able to identify certain publicity that would support a conclusion that the drives proposed by petitioners were partisan (Pet. App. 65a-66a), the proximity of those materials to any particular proposed registration drive was not shown.

union local that wished to undertake a registration drive would be relevant to the drive's permissibility under the Hatch Act. That factor as well could not be assessed by the Special Counsel without more specific facts than those provided him by petitioners.[6]

Finally, petitioners were free in 1984 and are free today to return to the Special Counsel with more information regarding any particular registration drive that the unions or their locals wish to conduct. Petitioners' contention that the letter nonetheless seriously threatened their members with prosecution for planned activities that they did not specify to the Special Counsel and with respect to which they could still seek his advice warrants no further review.[7]

2. The court of appeals also correctly determined that review of the Special Counsel's advisory opinion in this case would be inconsistent with the administrative scheme established by Congress in the Civil Service Reform Act of 1978 (CSRA). Cf. *Bush* v. *Lucas*, 462 U.S. 367 (1983) (refusing to imply a *Bivens*-type remedy for federal employees against their supervisors). Under the CSRA, the Special Counsel is empowered to investigate alleged Hatch Act violations and to present them to the MSPB for decision.

---

[6]The court of appeals emphasized that union locals were free to raise their particular fact situations before the Special Counsel (Pet. App. 18a, 19a).

[7]The cases on which petitioners rely are inapposite because they present far more immediate threats of prosecution than is apparent here. In *Steffel* v. *Thompson, supra*, for example, the plaintiff "ha[d] been twice warned to stop handbilling" and that if he "disobey[ed] a warning to stop he [would] likely be prosecuted," and a companion who engaged in the same activity had in fact been prosecuted (415 U.S. at 459). Similarly, in *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979), the Court stated that only "credible threat[s] of prosecution" would be sufficient for declaratory relief (*id.* at 298), and it held nonjusticiable claims that depended on particular fact situations that had not yet arisen (*id.* at 304-305).

See 5 U.S.C. 1206(e)(1)(A) and (g)(1). It is solely within the authority of the MSPB to adjudicate Hatch Act violations, and the Special Counsel's views are not binding on the Board. See 5 U.S.C. 1207(a) and (b); *Special Counsel* v. *Biggs*, 1983 Fed. Merit Sys. Rep. 5238 (Aug. 23, 1983). Thus, the Special Counsel's view of the law is in no sense a final agency determination reviewable in federal court. Judicial review of his advisory opinion here, which does not have the "status of law" (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152 (1967)), and "has no effect in and of itself" (*Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598 (1950)), would plainly be inappropriate. See, *e.g.*, *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 241-242 (1980) (issuance of complaint not "final agency action" subject to judicial review); cf. *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985) (agency's decision not to take enforcement action unreviewable). Judicial review at this early stage would prevent the MSPB from exercising its congressionally mandated responsibility authoritatively to interpret the Hatch Act in the first instance. See generally *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420-421 (1965) (primary jurisdiction doctrine).

Moreover, judicial review of the Special Counsel's advice to federal employees would, as the court of appeals noted (Pet. App. 14a), undermine his ability to give such advice. Although Congress generally barred the Special Counsel from giving advisory opinions, it expressly excepted Hatch Act inquiries from this prohibition. See 5 U.S.C. 1206(*l*). The availability of this advice helps to dispel whatever chilling effect might otherwise be produced by the Hatch Act. See *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973).[8] The

---

[8]Petitioners' reliance (Pet. 22) on *National Ass'n of Letter Carriers* is unavailing for a number of reasons. First, that case was decided before the enactment of the CSRA and the division of functions between the MSPB and the Special Counsel. Second, the plaintiffs there defined the

court of appeals correctly concluded that "routine surveillance" of the Special Counsel's advice would "hobble [him] in his role as a counselor" (Pet. App. 14a):

> [I]f the Special Counsel could be haled into court every time there was heard a discouraging word from his office, the giving of needed advice would perforce be hampered and might well be paralyzed. Absent some indication that the Special Counsel has metamorphosed from a counsel and constructor of safe harbors into a determined censor of government employees' political activities, judges should not jeopardize [the advisory opinion] process * * *.

Petitioners' attempt to "prevent[] the regular operation of the * * * procedures established by the [CSRA]" (*Abbott Laboratories*, 387 U.S. at 148) was properly rejected by the court of appeals.

---

activities that they desired to undertake in a much more specific fashion than here (see 413 U.S. at 551-552 n.3). Finally, the plaintiffs there, unlike here, alleged actual enforcement of the Hatch Act against them (*id.* at 551). *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), extensively relied on by petitioners (Pet. 18-19), is also inapposite. The state agency there, unlike the Special Counsel, had not simply given legal advice (372 U.S. at 68). Rather, the blacklists of undesirable books that the agency issued "plainly serve[d] as instruments of regulation," and "the Commission itself appear[ed] to have understood its function as the proscribing of objectionable publications, and not merely the giving of legal advice" (*id.* at 69 & n.9). See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 n.8 (1975) (*Bantam Books* involved system of censorship). Such censorship is wholly absent here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

LEONARD SCHAITMAN
NICHOLAS S. ZEPPOS
Attorneys

SEPTEMBER 1985

DOJ-1985-09